

ARTICLE 9

SECTION 3

COMMUNITY/SEPARATE PROPERTY

1. GENERAL

This section explains the regulations regarding the determination of separate and community property, automatic division of property for persons who entered long-term care prior to September 30, 1989, and Interspousal Agreements. For treatment of property of institutionalized individuals who were institutionalized after September 30, 1989 and apply for Medi-Cal on or after January 1, 1990, and their community spouses, see Section 13.

2. DEFINITIONS

A. Separate Property

Separate property is any item that is considered separate property under California Property Law. Property once identified as the separate property of one spouse continues to be considered as his/her separate property so long as it retains its separate identify. Should the name of the other spouse be added as an owner or if it is commingled with community funds (burial trusts and internment plots excepted), it immediately becomes community property. Separate property includes:

- 1) Property acquired by either spouse prior to marriage;
- 2) Property acquired by either spouse during marriage if purchased with funds which are the separate property of that spouse, (i.e., funds received from the sale of separate property);
- 3) Property acquired by either spouse by gift or inheritance during marriage;
- 4) Property acquired by either spouse when they are voluntarily or legally separated. For voluntary separations, consider the spouses separated the first of the month of physical separation; or,
- 5) Funds received by a married person for injuries incurred before the marriage are separate property beginning the month following the month of receipt. The funds are considered income in the month received;
- 6) A burial trust and/or internment plot held by either spouse for his/her personal use whether acquired before or during marriage;
- 7) In unmarried parent cases, the property of each unmarried parent;
- 8) Non-exempt community property which has been equally divided by an Interspousal Property Agreement;

- 9) An automatic division of community property has occurred due to a spouse entering LTC.

B. Community Property

Community property is property acquired by either spouse during marriage, unless the property can be identified as separate property per item 2.A. Workers should assume that property is community unless the applicant provides evidence that it is separate. ACWD 85-78

C. Interspousal Agreement

A written document, signed by both members of a married couple, which declares their intent to separate community property or otherwise transfer property between them. Such an agreement may be titled Postnuptial Settlement Agreement, or something similar. It may also be untitled. For purposes of this section, the term "Interspousal Agreement," or just "agreement" will be used. ACWD 85-57

D. Quasi Community Property

Property which would normally be considered separate may be treated as if it were community property. This term is used often in Interspousal Agreements drawn up by attorneys, even when such property is not involved in the agreement. If the term is used to describe specific items of property in an agreement, the worker should consider the property separate unless otherwise stated in the agreement.

E. Durable Power of Attorney

A durable power of attorney is one which includes a statement to the effect that it remains in force even after the person granting the power of attorney becomes incompetent.

F. Competent

A person is competent if he/she is able to understand normal communication and is able to act on his/her own behalf in business and personal matters.

G. Transmutation

This word is often used in Interspousal Agreements drawn up by attorneys. In this context, it refers to the change in form of community property to separate property.

3. SITUATIONS WHICH REQUIRE SEPARATE AND COMMUNITY PROPERTY DIFFERENTIATION

Regulations state that the separate and community property of all persons in the MFBU are included in the eligibility determination. Therefore, when all family members are included in the MFBU, there is no reason to differentiate between separate and community property.

Whenever one or more family members are excluded from the MFBU or when the case consists of two separate MFBUs, it may be necessary to distinguish between the separate and

community property of each family member. The following situations require separate and community property differentiation.

- A. Cases in which one spouse or parent is a PA recipient.
- B. Cases in which two MFBUs are established because one spouse or parent entered long-term care prior to September 30, 1989.
- C. Stepparent cases, (i.e., only the separate children of one parent are in the MBFU).

Separate property must be verified in order to determine its separate status.

4. SHARE OF COMMUNITY PROPERTY

A spouse's share of community property is always one-half of the current total community property. (See item 6. below for automatic division when a spouse is in long-term care.) The assets are continuously divided so that each spouse is always counted with half of the current community property assets. This amount plus any separate property would be considered in determining Medi-Cal eligibility. MEM 50403

5. INTERSPOUSAL AGREEMENT

Interspousal Agreement executed in accordance with California Community Property Law is considered "adequate consideration" for transfers of property for purposes of Medi-Cal eligibility. An Interspousal Agreement must divide the community property into equal shares of separate property in order to meet the transfer of property requirement. ACWD 85-57

This agreement does not benefit a couple when both spouses must be included in the MFBU since all of their property would be considered.

A. Minimum Conditions

The agreement does not have to be drawn up by an attorney but must meet the minimum requirements as follows:

1) Written Agreement

It must be in writing, dated, and signed by both spouses or by a person who has the legal authority to enter into such agreements on behalf of either spouse;

2) Competency

The agreement must be based on the mutual consent of both spouses. If one is not competent, someone other than the well spouse must act on behalf of the incompetent spouse. The person who does this must be the public guardian, a court appointed conservator (of the estate), or a person who has been granted a durable power of attorney.

The competency of parties to the agreement should not be questioned, unless there is an indication that one spouse is or was incompetent at the time he/she signed the agreement. Examples of circumstances which may need to be questioned and/or evaluated are:

- a) The individual is currently incompetent and the agreement was signed with the last few months.
- b) The individual is currently incompetent, has been institutionalized (including LTC), and the agreement was signed within a few months prior to or since the date of institutionalization.

If competency is questionable and the agreement was drawn up by an attorney, a written statement from that attorney stating in his/her opinion that both parties to the agreement were competent at the time they signed, is sufficient evidence of competency.

If an attorney was not involved in the agreement, or is not available to provide a statement, a doctor's statement should be obtained.

If neither an attorney nor physician's statement is available, a statement from a non-relative is acceptable. Such statements should include a brief description of the writer's frequency and degree of contact with the ill spouse. For example: "I have known Mr. Smith since 1979, and during May and June of 1988, I visited with him about once a week";

3) Accounting of Value

The agreement must contain an accounting of the value of each asset.

a) Listing

Each item of property must be adequately described and its value stated. For example:

- | | | |
|-----|--|-------------|
| (1) | North Island Federal Credit Union
Imperial Beach Branch
Checking Account # XXXXXXXX-XX | \$ 3,472.10 |
| (2) | 1980 Cadillac
CA Lic. XXXXXXXX | \$ 4,000.00 |
| (3) | 1977 Motor home
CA Lic. XXXXXXXX | \$14,000.00 |

The values stated may differ from values determined by methods described for valuation of property by Medi-Cal regulations (see item 5.B. below).

b) Encumbrances

If any item of property is encumbered, the amount of the encumbrance must be stated somewhere in the Interspousal Agreement;

4) Method of Division of Property

The agreement must state how the assets are to be divided. Each item of property need not be divided equally. The division could divide each asset in half or could divide the total of all similar assets in half. Example:

The couple owns a boat and trailer valued at \$600. They also own a savings account valued at \$5,000. The agreement may specify that the husband becomes sole owner of the boat and trailer, and that the savings account be separated into two unequal accounts. The wife receives \$2,800 of the savings account as her separate property, the husband receives \$2,200 of the savings account as his separate property plus the \$600 from the boat and trailer, making equal shares of \$2,800 each.

The agreement must specify whether each item is divided equally or describe alternate methods of dividing the property; and

5) Evidence of Equal Division

The resulting totals of separate and share of remaining community property for each spouse do not have to be stated in the agreement. However, the totals must reflect an approximately equal division of non-exempt property.

a) Effect of Division of Exempt Property

The purpose of this regulation is to clarify that married couples have the right to protect one-half of their community property that, without an Interspousal Agreement, would have to be reduced before one member of the couple could qualify for Medi-Cal benefits. The only resources which are subject to reduction for Medi-Cal purposes are non-exempt resources. Therefore, it is one-half of the non-exempt resources which can be protected by the Interspousal Agreement. Although couples may also choose to divide any exempt resources they own, all non-exempt resources divided by the agreement must be divided into equal shares of separate property.

b) Transfers of Separate Property

An Interspousal Agreement may specify that part or all of separate property are involved in the transfer. A gift of separate property must be evaluated for its effect on eligibility in accordance with the Beltran v. Myers court order (MPG Article 9, Section 7). However, a transfer of separate property from one spouse to the other with an Interspousal Agreement may meet adequate consideration requirements when the intent is to compensate one spouse for a share of community property retained by the other spouse.

B. Other Requirements

1) Verification of Values

The value of each item of property considered in the Interspousal Agreement must be verified.

The values must be determined and verified as of the effective date of the agreement, and again as of the month(s) for which eligibility is evaluated, if those months are different.

The methods of determining and verifying value stated in MPG Article 9 are to be used. If verification or documentation necessary to determine value is no longer available, the applicant's sworn statement is acceptable.

It is possible that the value stated in the agreement will differ from the value determined according to the regulations. This situation does not necessarily render the agreement invalid. When this situation exists, the following guidelines should be used:

a) Evaluating Equal Division

For purposes of determining whether equal division of property has occurred, the value stated in the agreement should be used unless it appears to be substantially misstated in terms of actual market value.

For example:

The agreement lists a 1977 Cadillac with a stated value of \$3,500.00. Per the method of determining value in MPG Article 9, the worker determines the value to be \$2,000.00. The applicant states that he determined the value stated in the agreement by checking the classified ads for prices of similar models, and concluded that, \$3,500.00 was the approximate worth of the vehicle. Since the applicant's methods of determining the value was reasonable, the value stated in the agreement is to be used in determining whether equal division requirements are met.

b) Current Value for Property Reserve

When determining the value of the separate property as part of the countable property reserve, the value established by the regulation will be used.

For example:

In the example cited in a) above, assume the Cadillac was changed from joint ownership to equal separate shares in the agreement. The spouses in LTC would own property valued at \$1,750.00 if the agreement value were used. However, per the regulations, her interest in the Cadillac is only \$1,000.00. In

this case, the \$1,000.00 amount would be included in the property reserve of the LTC spouse.

c) Evidence of an Unequal Division of Property

(1) If the applicant received the smaller share of property, the County shall evaluate for adequate consideration. (Refer to Article 9, Section 7).

(a) If the County determines that the transfer was not for adequate consideration, the County will give the applicant's spouse the option of reconveying an amount of property sufficient to provide each spouse with equal shares of non-exempt community property.

(b) If the applicant's spouse does not reconvey the property, the County will determine a period of ineligibility. (Refer to Article 9, Section 7, Item 6).

2) Verification of Separation of Property

Where an agreement divides a separable asset, such as bank accounts, the agreement must be supported by evidence that the asset was, in fact, made separate, such as "before" and "after" bank statements, DMV documents, recorded deeds to real property or notes, etc.

The documents must clearly indicate that the property was made separate and that the resulting separate property became unavailable to the non-owner spouse. If the documents do not clearly indicate who is the sole owner (has right to sell or otherwise dispose of the property), the source of documentation may need to be contacted for clarification.

For example:

a) An agreement lists of \$10,000 joint savings account as community property and declares that \$5,000 of that account is to become the separate property of each spouse. To make the accounts unavailable to each other, the parties must provide bank statements or other evidence showing that two separate accounts existed where one had before. Each resulting account must be shown as inaccessible to the non-owner spouse. If bank statements are unclear, the applicant may be asked to provide a letter from a bank employee stating exactly what persons are permitted to withdraw funds from what accounts.

b) As part of an agreement, the husband agrees to transfer his community property interest in a non-exempt vehicle to his wife. The resulting DMV documents must clearly show the wife's name only as legal owner of the vehicle.

The actual transfer of ownership, or separation of the property, may occur before or after the date the Interspousal Agreement was signed.

Where written title is not normally required, such as for jewelry, additional verification of the separate share status is not required.

3) Effective Date of Interspousal Agreement

A valid Interspousal Agreement may be completed at any time, including after an application for Medi-Cal is made.

Community property divided into separate property becomes separate in the month the actual separation of assets took place, as determined by the supporting verification described in item 5.B.2) above, or on the date of the Interspousal Agreement, whichever is later.

4) Amendments

An otherwise invalid Interspousal Agreement may be considered valid if later amended to meet the criteria outlines in 5.A.3) and 5.A.4), and supported by verifications and evidence of separation of the assets described in 5.B.1) and 5.B.2) above.

The date of an amendment completed for this purpose does not change the effective date determined according to the instructions in 3) above.

If both spouses remain competent, both spouses should sign the amendment, however, the amendment is valid if signed by a well-spouse under penalty of perjury. Lack of both spouses' signatures on amendments is acceptable assuming that evidence of equal division and verification of value requirements are met.

If one spouse is in LTC, the worker may do an "automatic division," per item 6. below, if the applicant accepts this division.

5) Attorney. Witness

An Interspousal Agreement does not have to be drawn up by an attorney as long as it meets the minimum requirements stated above.

A valid agreement does not require a witness signature, notarization, or legal recording with a public agency.

6) Exempt Property

It is important to remember that exempt property may be given away without penalty. (See MPG Article 9, Section 7 for transfer of property limitations.)

If an Interspousal Agreement does not include the gifting of exempt property to one spouse as his/her sole and separate property, then the applicant/beneficiary should be reminded that sale or other conversion of that property may result in an increase in the property reserve and potential ineligibility.

7) Case File Copies

A copy of the Interspousal Agreement, any amendments, and verification of competency (when required) must be filed in the case record.

Other verifications must be viewed and adequately documented by the worker.

8) Referral to Attorney

Although an attorney is not required to draw up a valid Interspousal Agreement, applicants with questions about the effects of such an agreement on existing wills, survivorship rights, probate, etc., should be advised to consult an attorney for answers to those questions.

Where real property is involved, an attorney's advice is also recommended. For example: an unrecorded quit claim of real property may not accomplish the desired transfer because it is revocable at will.

In general, questions about Interspousal Agreements which cannot be answered with the information in this section probably require consultation with an attorney.

6. AUTOMATIC DIVISION OF COMMUNITY PROPERTY-LTC FOR PERSONS WHO ENTERED LTC PRIOR TO SEPTEMBER 30, 1989

When a married couple has not executed a written Interspousal Agreement, and one spouse enters a skilled nursing, or intermediate care, or other medical facility, an "automatic" division of non-exempt community property takes place for purposes of determining each spouse's eligibility to Medi-Cal, as if a valid Interspousal Agreement had been effective the day one spouse entered the medical facility. This automatic division designates one-half of the total non-exempt community property to be each spouse's share.

ACWD
85-78

Treatment of community property in this manner applies only when a spouse enters a skilled nursing, intermediate care, or other medical facility. Admission to board and care does not qualify the couple for automatic division of community property.

NOTE: It is important to remember that this regulation changes the way community property is treated and evaluated for purposes of Medi-Cal eligibility in specific situations. It does not change California Community Property Law. Legally, without a written Interspousal Agreement, each spouse retains a one-half interest in the community property.

It is to be presumed that all property owned by either spouse is community property. This presumption, however, can be rebutted by either spouse by providing verification that confirms separate property status.

If the separate property owned by a spouse is actually made available to the other spouse, the amount of the property made available is considered in determining the Medi-Cal applicant's/beneficiary's eligibility.

The "automatic division" of community property constitutes a transfer of property for full and adequate consideration.

A. Effective Dates

1) Effective Date of Division of Property

The total non-exempt community property held by the couple as of the date one enters LTC must be determined. One-half of that total is considered to be each spouse's share of community property as of that date.

The fact that the date LTC began may have preceded the effective date of the law does not change the effective date of the division of the property.

2) Effective Date of Law

The earliest date on which eligibility could exist based on the provisions of this automatic division of property is September, 1985.

B. Reduction of Excess Property

If the applicant/beneficiary exceeds the property limits, the property may be reduced before the end of the month in order to qualify for Medi-Cal (see Article 9, Section 1).

1) Requirements

To qualify for Medi-Cal under this rule, the applicant spouse must provide evidence that his/her share of community property (determined per item 6.A. above) in excess of the property limit was reduced for his/her own benefit.

The following guidelines should be used to evaluate whether a spouse's share of community property was expended for his/her own benefit:

- a) Expenditures must be for property in which the individual has an ownership interest.
- b) Expenditures need not be limited to medical expenses.
- c) Expenditures resulting in conversion to exempt property are acceptable.
- d) Receipt of adequate consideration by the individual for any expenditures would generally be considered to be for that individual's own benefit. This is true even when the individual cannot use a purchased item, etc. The "benefit," in some circumstances, is purely a financial interest in the resulting property.

•DHS Clarification
•ACWD
•85-78

EXAMPLES (assume one spouse at home, one in LTC):

- (1) Each spouse pays an equal amount toward the mortgage on their home (principal residence). In this case, each spouse has received adequate consideration and benefited by the increased equity in the home, even though the home remains exempt property.
- (2) The couple purchases a new automobile. The LTC spouse can no longer drive, but the other spouse has transportation needs. Each spouse has received adequate consideration in the form of a financial interest in the automobile and, therefore, each spouse has "benefited." The LTC spouse's equity in the automobile is exempt property and is not included in his/her property reserve.

2) Documentation of Reduction of Excess Property

Since income becomes property in the month following the month of receipt, it may be necessary to document that no income has become property.

ACWD
90-74

One way to document how much property was reduced in a given year is to compare the verified annual expenditures from the LTC spouse's share of the couple's annual income. If the expenditures are less than the income, there will be an increase in the property to be reduced. If the expenditures are greater than the income, the excess expenditures are then subtracted from the LTC person's property to be reduced. The remainder is the amount of property left to be reduced.

EXAMPLE

Couple's annual income = \$20,000
LTC share of income = $20,000 \div 2 = 10,000$
LTC person's verified annual expenditures = \$24,000
LTC person's property to be reduced = \$30,000

	24,000	annual expenditures
-	<u>10,000</u>	<u>annual income (LTC share)</u>
	14,000	excess expenditures
	30,000	property to be reduced
-	<u>14,000</u>	<u>excess expenditures</u>
	16,000	remaining excess property to be reduced

C. Special Situations

1) Change in Property

When new non-exempt community property is acquired, or exempt property becomes non-exempt property, the automatic division rule is applied to the additional property.

2) LTC Payment Refunds

Refunds made to the beneficiary/couple by LTC facilities or other medical providers are considered property.

If an LTC beneficiary's spouse's share of community property was used to pay for the medical expenses, the refund should be treated as the at-home spouse's property.

Payments made from the LTC spouse's countable property which were necessary to bring his/her countable property within allowable limits should not be billed to Medi-Cal by the provider since refunds of those amounts may result in excess property for the LTC beneficiary in the month of receipt.

Applicant should be advised of this possibility and the need to discuss billing and reimbursement with the provider. Applicants should be reminded of their responsibility to report all receipts of property to the worker within 10 days of receipt.

3) Effect of Change in LTC Status

Once an automatic division of non-exempt community property has been established, treatment of that property remains the same if the LTC spouse changes from an intermediate care facility to a skilled nursing facility, or vice versa, or changes LTC facilities. Community property share status is also unaffected by temporary admission to an acute care facility when readmission to LTC directly from the acute care facility is anticipated.

Discharged from the LTC facility to home or another independent living arrangement, or to Board and Care, changes the treatment of property back to consideration of each spouse's share of the community property which exists as of the date of the discharge.

APPENDIX A

SUMMARY OF WHEN TO USE CALIFORNIA'S EXISTING DIVISION OF
COMMUNITY PROPERTY RULES AND WHEN TO USE MCCA RULES

<u>Situation</u>	<u>Treatment</u>
1. Case in LTC and on Medi-Cal before September 30, 1989.	CONTINUE TO USE EXISTING DIVISION OF COMMUNITY PROPERTY RULES.
2. LTC cases where the spouse was <u>admitted</u> into LTC before September 30, 1989. (Regardless of when they apply.)	CONTINUE TO USE EXISTING DIVISION OF COMMUNITY PROPERTY RULES.
3. LTC cases where the spouse was admitted AND applied and was found eligible for Medi-Cal <u>between</u> September 30, 1989 and December 31, 1989.	USE EXISTING DIVISION OF COMMUNITY PROPERTY RULES.
4. LTC cases where the spouse was admitted into LTC <u>after</u> September 30, 1989 and did not apply until <u>after</u> December 31, 1989.	USE NEW MCCA RULES FOR PROPERTY.*
5. LTC cases where the spouse was admitted into LTC and applied <u>after</u> December 31, 1989.	USE NEW MCCA RULES FOR PROPERTY.*

* See Article 9, Section 13 for MCCA Rules.